Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1460

IN THE

Supreme Court of the United States

October Term, 1988

DENNIS GROHS,

Petitioner,

vs.

GOLD BOND BUILDING PRODUCTS, a division of NATIONAL GYPSUM COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

Respondent has described this as an "ordinary, run-of-the-mill ADEA case." The Seventh Circuit has made this case significant by rewriting the facts contrary to the well-established mandate

of this Court. The appellate court did not just "review" the record, but "reweighed" the record and made its own presumptions, inferences and findings of fact. The Seventh Circuit has overstepped its bounds by duplicating the efforts of the trial court. The result is a "huge cost in diversion of judicial resources," cautioned against in Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

I. RESPONDENT'S FACTS

Respondent has misstated or ignored facts upon which the district court based his opinion. In making the decision to reopen the Waukegan plant, upper managment determined that poor labor relations **policies** were largely responsible for the deterioration of the plant. [Pet. App. 28] Dennis Grohs had strictly followed the **old policy**, which made him a strict boss and a head knocker at times, but that

was what management perceived as necessary to run the Board Plant. Not only Grohs, but all supervisors were experiencing problems with labor relations because prior to the shutdown employee discipline was inconsistent. [Pet. App. 100]

At the start up, Mike Ward wanted his supervisors to be "tuned in" to labor relations. [Pet. App. 70] There is no record evidence that Ward was told to place "great importance" on labor relations. However, one of his objectives was to foster good relations among the employees. [Pet. App. 71] Thus, Ward instituted a **new policy** of softer supervision to be followed by the supervisory personnel. As the trial court found, this new policy was that "management would stroke the workforce a <u>little more</u> than had previously been the practice." [Emphasis added. Pet. App. 3a] Grohs was

not given the chance to follow the new policy. The district court found that Respondent did not seek "to teach him new tricks to the limited extent that that was necessary." He was discharged. All of the remaining supervisors, ages 31, 33, 41 and 43, were taught the new policy.

It is true that the district judge allowed Mike Ward to testify at great length about numerous hearsay statements allegedly made by Thomas Brooks. However, it is clear from the district court's opinion that he did not credit Ward's testimony. Brooks could have easily laid off Grohs in October, 1981, or January, 1982. Instead, Brooks retained Grohs and three other supervisors during the shutdown. As the court found, he gave Grohs very good ratings coupled with good raises. Also, Robert Coventry, Grohs' direct supervisor prior to the shutdown,

and Murray Qualls, Grohs' supervisor during the shutdown, both testified that Brooks was very pleased with Grohs just prior to the shutdown. Brooks did not testify. At the time of the trial, he was a Plant Manger employed by Respondent in Phoenix, Arizona. A custodian of records was flown in from North Carolina to testify, and a former employee, who was first contacted the day before trial, was also flown in from North Carolina to testify. Respondent did not explain why Thomas Brooks, its most important witness, did not testify at the trial.

In its Opposition, page 10, Respondent states: "Petitioner never challenged the fact that Ward read and heard these reports or that he relied upon them in deciding to discharge petitioner." As for what he had "read," Ward admitted that it appeared that Grohs had done a good job

as Board Plant Superintendent on paper. Also, at the trial counsel for Grohs argued that Ward's belief could not have been genuine because the most crucial witness, as well as other witnesses, did not testify and Respondent's witnesses who did testify, including Ward, were all impeached.

The district court rightly found the numerous allegations against Grohs to be a pretext list, dredged up by Respondent after Grohs' discharge in response to an inquiry from the EEOC. The district court questioned whether the incidents had ever happened and found them to be meaningless.

Darlene Ramig, the payroll secretary, and Jon Roth, the former union president, both testified for Respondent. Their testimony was impeached by Petitioner. Roth was the strong leader of the union who filed grievances on 50% of the

complaints of the union members. Grohs had very few grievances filed against him over the years, including the last 3 years prior to the shutdown. The Court found that fact to be significant. The Court also found that Grohs, being much older, addressed all of his employees as "boys," and Grohs quit when he was told that the black employee did not like it. The court did not find that Grohs was hated, but that given his role as a strict boss it would not be surprising if Grohs was disliked. The root cause of most labor-management relations at the plant was the company's own labor relations **policies** - not Grohs. [Pet. App. 28] The district court did not credit Ward's testimony.

Likewise, the payroll secretary, Darlene Ramig, who testified for Respondent, was impeached. She admitted that she had not recalled a "motel

proposition" by Grohs when she was shown Respondent's allegations to the EEOC and questioned about it by the undersigned in August, 1984. Nor was the comment made by Grohs a "lesbian" comment. [1]

Respondent claims that each of Grohs' last three appraisals ranked him low in employee relations. Labor relations was not a priority at that time. Labor relations referred to the uniform system of discipline Respondent was instituting because Grohs, as well as all of the other supervisors, was inconsistent. Grohs' August, 1980, appraisal rated him "close to outstanding" in job performance and

[1] At the trial and in its brief to the appellate court, Respondent claimed that Grohs referred to Becky Parkman and Donna Bittner as "dikes." Grohs testified and Ramig confirmed that he had made a joking statement, "If I didn't know any better, I'd think that those two were in love." The two women were sitting at a restaurant with their heads together. [Pet. App. 121]

stated that he was weak in labor relations, but striving to improve. Grohs' August, 1981, appraisal indicates that he had improved in labor relations. Grohs testified that he received a good oral evaluation, coupled with a good raise, at the shutdown in February, 1982. Grohs signed a blank evaluation because Brooks did not have time to complete it. [Tr. 333] Before Grohs became Board Plant Superintendent in 1979, he was Mill Superintendent for 7 years. In that job, his labor relations were excellent because it was a slow-moving department with more senior and skilled employees. [Pet. App. 33, 95, 96] The job of Board Plant Superintendent was a challenge because it was a large department with unskilled employees, high-speed, dangerous equipment and many employee problems. [Pet. App. 90, 91, 93, 94 105, 106] Grohs had to

supervise the employees through 3 foremen. Grohs had problem people, not people problems. [Pet. App. 94] Grohs was told by the Plant Manager to knock heads together because the employees needed discipline. [Pet. App. 105-106] He did what he was told and he received good performance evaluations and good raises. Labor problems only dealt with the uniform system of discipline Respondent was instituting at the time. Grohs direct supervisor, Robert Coventry, testified that prior to the shutdown, Grohs did not have labor relations problems. [Pet. App. 97aa] Grohs was the supervisor that Respondent had raised him to be. Mike Ward, himself, admitted during the trial that on paper it had appeared that Grohs had done a good job as Board Plant Superintendent. [Pet. App. 78]

When Ward discharged Grohs, he told him that he could not get along with his peers. Nothing was said about the hourly employees. Respondent added new reasons for Grohs' discharge in its letters to the EEOC. Additional reasons were given during discovery. Finally, at the trial even more reasons were given. The district court found these reasons to be a pretext list.

At the same time Ward discharged Grohs, April 29, 1983, he hired Roth (age 43). Ward groomed Dave Burks, age 33, to become the Board Plant Superintendent. [Pet. App. 119-120] Burks resigned at the end of July, and on September 1, 1983, Ward hired Herman Fraley, age 34, as Board Plant Superintendent. Contrary to Respondent's assertions, Junior Henkel, age 53, was hired long after Roth and Fraley, in March, 1984, eleven months

after Grohs' discharge and long after the union was decertified.

II. THE DISTRICT COURT'S OPINION

The finding of direct evidence of discrimination is in the district court's opinion in black and white. Robert Sarvis "leaned on" Ward to "get rid of Grohs" because Sarvis believed that Grohs was "old and fat." That finding is based upon record evidence. That finding alone requires reversal by this Court.

The district court's opinion is consistent and therefore not clearly erroneous. The district court found Grohs to be what Respondent had raised him to be and had expected him to be until the time of the start up. [Pet. App. 4-5] The Court found that not only Grohs, but all of the supervisors were "big, strong, husky fellows without particularly sophisticated educational backgrounds, who were

direct, strict, somewhat rough around the edges, and comfortable on the production floor." [Pet. App. 4] Respondent changed its labor relations **policies** at the start up. The Court did not find that Grohs could not meet the new standards, but that the standards had been different in the past.

The district court accepted Grohs' own description of himself as a "head knocker" because in 1979, when he became Board Plant Superintendent, Grohs had been instructed to knock heads together by the Plant Manager. The Court rejected Ward's testimony about the reports he had received about Grohs and held that they were no more than a laundry list or pretext list.

III. RESPONDENT'S ARGUMENT

The issue in this case is discriminatory intent. In Pullman-Standard v.

Swint, 456 U.S. 273 (1982) this Court held that the existence of discriminatory intent is an issue of fact to be determined by the trial court. Here, the district court listened to live testimony and made credibility determinations. The Court believed Grohs and his witnesses and discredited Respondent's witnesses. The findings of the Court that Respondent acted with discriminatory intent when it discharged Grohs are supported by testimonial evidence. However, the Seventh Circuit chose to believe Respondent's witnesses. In Hagge v. Bauer, 827 F. 2d 101, 108 (7th Cir. 1987) Judge Posner [one of the judges on this panel] upheld a district court's opinion as not clearly erroneous even though Posner felt that the evidence was "thin." The basis for Judge Posner's ruling was that the Court had made credibility

determinations based upon witness testimony. In the instant case, the findings are supported by testimonial evidence and are thus not clearly erroneous. [2]

The district court did not find that Grohs lacked qualifications for the new role of the supervisory force. The court found that Respondent did not give him a chance. He had been a good, strong performer and he was discharged. Also, contrary to Respondent's assertions, younger employees were being taught about the new labor relations policies. The court did not credit Ward's testimony that he based his decision on the negative reports he allegedly received. Also, Ward

[2] None of the cases cited by Respondent for the proposition that the trial judge's finding of fact must be supported by substantial evidence address credibility findings based upon testimony.

admitted that he was aware that during the shut-down of the Waukegan plant, Grohs had trained employees at the start-up of Medicine Lodge, one of Respondent's. largest plants. [Tr. 188] Grohs had done an excellent job training the employees and there were no complaints. [Pet. App. 56] Thus, the most recent information about his superisory job performance was just prior to the Waukegan start up.

Respondent has spent much time unnecessarily on the Seventh Circuit's rejection of Petitioner's arguments. It is true that the appellate court accepted Respondent's facts and argument verbatim. However, the central issue to be addressed by this Court is whether the District Court's opinion is supported by the evidence. The district court's finding of direct and circumstantial evidence of

discrimination is amply supported by the record.

IV. ERRORS

In its brief Respondent has chastised Petitioner for typographical errors in his Petition Appendix. Those errors were unintentional. Dennis Grohs has not been gainfully employed since 1983. He has only worked part-time since late 1986. Grohs could not afford to have his briefs and appendix printed. Therefore, they were hurriedly typed. Also, this is the first time the undersigned, who is a sole practitioner, has appeared before this Court.

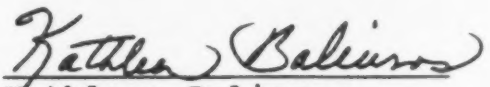
It should be mentioned that it was no error on Respondent's part that Richard Lieberman was not named as counsel of record, although this Court mandates him to identify himself as such. Mr. Lieberman not only examined and cross-

examined witnesses, but he gave both the opening and closing arguments at the trial. His co-counsel at the trial is the sole attorney named as counsel of record.

Conclusion

Based upon the foregoing, it is respectfully requested that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,



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